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No. 80-1146

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,

Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue, and STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

BRIEF OF APPELLANTS

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April, 1981

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THE CONSTITUTIONAL QUESTIONS PRESENTED

1. May a State, for any purpose, impose a cumulative open-ended durational residency requirement so that new residents never achieve equal treatment with other residents who arrived earlier?

2. May a State impose an unlimited and perpetual durational residency requirement in conferring economic advantage or benefits?

3. May a State distribute shares in its oil, gas and mineral revenues, including Federal lease and bonus revenues, based upon the recipient's duration of residency viewed retrospectively to Statehood?

4. Can compliance with the demands of the Fourteenth Amendment be determined by forecasting a lifetime of potential effects which, if they actually do occur, might tend to minimize a present disparity of treatment?

5. Is there a violation of State citizenship, as secured by the Fourteenth Amendment, where a durational residency classification is used not as a test of the *bona fides* of a claim of State citizenship but rather as a device to perpetually deny equal treatment to new residents?

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ON APPEAL FROM THE SUPREME COURT FOR THE STATE OF ALASKA

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the Superior Court is not published. The Alaska Supreme Court has written two opinions in this case. The first of these, concerning a legislative scheme to exempt long-term taxpayers from the personal income tax is reported as *Williams v. Zobel,* 619 P.2d 422 (Alaska 1980). The second opinion, which concerned the statute at issue here, is reported as *Williams v. Zobel,* 619 P.2d 448 (Alaska 1980).

JURISDICTION OF THIS COURT

This is an appeal from a decision of the Alaska Supreme Court declaring a statute which distributes money earned by Alaska's Permanent Fund solely on the basis of durational residency to be constitutional. This statute was challenged by the appellants on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This challenge was rejected by the Alaska Supreme Court in a judgment issued on October 24, 1980. Appellants filed a Notice of Appeal to this Court in the Alaska Supreme Court on October 28, 1980. The appeal was docketed on January 9, 1981.

This Court has jurisdiction under 28 U.S.C. §1257(2) to hear this appeal.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Alaska Permanent Fund was established by Article IX, Section 15 of the Alaska Constitution. A copy of that constitutional provision is in the Appendix to this Brief. The Permanent Fund Dividend distribution statute which is the subject of this appeal appears at Alaska Stat. §43.23.010 et seq. A copy of those statutory provisions is also included in the Appendix to this Brief.

The appellants contend that the distribution statute offends Section I of the Fourteenth Amendment of the United States Constitution which states the following:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The tremendous oil and mineral wealth bestowed upon Alaska has created a situation which the Alaska Supreme Court has labelled "unique." Faced with surplus revenues far in excess of amounts needed for ordinary governmental functions, the State established a Permanent Fund in 1976. At least twenty-five percent of all mineral lease revenues, royalties, royalty sale proceeds and federal mineral revenue sharing payments and bonuses are placed into the fund. The provisions establishing the fund appear in the Appendix.

By a statute passed on April 15, 1980, Alaska Stat. §43.23.010, et seq., the State has proposed to give away one-half of the earnings of that fund to its citizenry. The amount which any Alaska resident receives will be solely and directly tied to the duration of his or her residency. No criterion other than duration of residency is utilized in assessing the size of the distribution which each resident will receive. The statute has retrospective effect back to the year 1959. The relevant statutory provisions appear in the Appendix.

The Alaska Department of Revenue estimates that distributions from the Fund during the year 1980 will total one hundred and thirty million dollars ($130,000,000.00). A similar amount is projected to be distributed to the citizenry, based on duration of their residency, in 1981. The Department of Revenue has estimated that the yearly gross distribution by the year 1986 will approach one-half of one billion dollars. 619 P.2d at 467, n.4.

Appellants, residents of the State of Alaska since 1978 (R. 1, 20), filed suit in the Superior Court for the Third Judicial District of the State of Alaska seeking, among other things, a declaration that distribution of State assets to the citizenry based solely on the duration of their residency violated the Fourteenth Amendment of the United States Constitution. The Superior Court Judge agreed that the plan was unconstitutional and entered judgment on June 30, 1980 in favor of the Appellants (R. 315). No distributions pursuant to the

plan had taken place at that time and any prospective distributions were enjoined.

An appeal to the Supreme Court of the State of Alaska followed. On October 24, 1980, the Alaska Supreme Court issued an opinion declaring that the judgment of the lower Court was reversed. The Court split three to two on the question.

SUMMARY OF THE ARGUMENT

This is the most radical durational residency requirement ever brought before this Court. It is qualitatively unlike almost all other durational residency requirements in that it does not purport to be a test for State citizenship. Indeed, it is not a test for anything.

It is also quantitatively the most extreme durational residency requirement which this Court has ever seen. The length of residency required to obtain the maximum benefit under this program is limited only by the human life span. Appellants will never attain the maximum benefit so long as there is someone alive who arrived in Alaska before them. Each year this statute creates a new class of persons who have less rights than all who have come before them.

Perpetually determining an individual's rights based upon when he arrived in the State is a penalty upon the right of interstate migration. Such a harsh classification should be deemed to be a penalty *per se*. Newcomers, as a class, share many of the characteristics of other classifications which this Court has labelled suspect. The fact that this statute is clearly directed against them should be enough to trigger strict scrutiny. Additionally, the statute impacts upon important individual interests and federalism concerns in such a fashion as to make penalty analysis appropriate.

Equal protection forbids an effort to apportion services or benefits between new and old residents. One reason that such apportionment is forbidden is that the first sentence of the Fourteenth Amendment contains a substantive guarantee of the right to enter a State and, upon a *bona fide* residence, enjoy

the same rights as other citizens. State citizenship is granted by the Federal Constitution, not by the State of Alaska. The only legitimate purpose for a durational residency requirement is as a test of *bona fide* residence.

None of the purposes which the State of Alaska advances in defense of this statute are compelling. Indeed, they are not fairly and substantially related to any important State interest nor are they even rationally connected to one. This statute is neatly tailored to do only one thing, to reward long-term residents. That is an impermissible purpose.

I. THIS STATUTE REPRESENTS THE MOST EXTREME DURATIONAL RESIDENCY REQUIREMENT EVER BROUGHT BEFORE THIS COURT

A. THE LEGISLATIVE HISTORY DEMONSTRATES AN INTENT TO DISCRIMINATE AGAINST NEW RESIDENTS

The Eleventh Alaska Legislature was faced with huge revenue surpluses and public demands that some of that wealth be returned to the citizenry through tax repeal and cash rebates. Part of its response to these demands was the statute before this Court. The plan being scrutinized here is designed to annually distribute a portion of those surplus revenues to adult residents based solely on the duration of their residency.

The bill which eventually became the Alaska Permanent Fund Distribution Act, Senate Bill 122, originated in the Alaska State Senate as a bill which would reduce taxes, provide for tax refunds, and distribute the earnings in the permanent fund. This bill provided for tax relief and tax rebates through a complicated formula based on how many years a person had filed an Alaska personal income tax form. This formula was supported because it would benefit "people who

have lived in Alaska for a long time." (Remarks of Senator Ray,[1] R. 173.) The bill was passed and was sent to the House.(R. 175.)

When the bill reached the floor of the House, it had been amended to provide for a four-year suspension of the Alaska personal income tax and payments to State residents from earnings of the permanent fund. Under the bill all Alaska residents who had resided in Alaska for one year would receive an equal payment. The Chairman of the Rules Committee reported that the Attorney General said that a durational residency classification running back to Statehood would be constitutional but that "our own legal division suggests that probably one year is all that we can require as far as residency, and still fall inside the guidelines of the Constitution." (Remarks of Rep. Cotten, R. 181-82.) The bill passed the House and was eventually sent to a Free Conference Committee[2] made up of three members from each house.

The Free Conference Committee re-wrote Senate Bill 122 to provide for a residency based distribution of earnings from the Permanent Fund going back to Statehood, completely amended another bill (S.B. 394) to provide for tax exemptions for those who had filed Alaska net income tax returns for three years, and sent both bills to the floor of each house as a legislative package.[3] In this way the residency based tax and cash rebate scheme of the Senate (S.B. 122) was carried into the two systems established by the House.

The Senate passed both bills without debate (R. 197-203). In the House debate erupted over the constitutionality and fairness of discriminating against newcomers to the State. Representative Randolph said:

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[1]Senator Ray was on the Free Conference Committee that eventually wrote the statute before the Court.

[2]In the Alaska Legislature a Free Conference Committee can completely re-write a bill and send it to the floor of each house.

[3]The bills were debated together and referred to as being "tied together" (Remarks of Rep. Randolph, R. 208), whereas before "two bills were one bill." (Remarks of Rep. Smith, R. 212).

However, there is one area that really does disturb me, and it could be the Achilles' heel of this whole—of this whole issue, and I want to be clearly on record as being concerned about it. And it addresses the way we deal with newcomers, newcomers to the Alaska work market, whether they be Outsiders, or so-called Outsiders, or our own children as they grow up and come into the work market. . . . And I think it's really arbitrary to try to decide who a newcomer is, and what they ought to get or what they ought to be entitled to. You know, some people may consider a newcomer a two-year resident or a four-year resident, on the other hand a person who's lived here 50 or 60 years may very well consider anybody who's been here 10 years or 15 years as newcomers.

I also think it's worth making the point that a person who has been here for 50 or 60 years, and unfortunately been a ward of the State all of that time, I have some questions as to whether they have more coming from our surplus distribution than maybe a person who's been here a couple of years, and through the use of their time, their talent, their skills and their capital contributed significantly to the betterment of all of us. . . . So I get a little bit tired of—and I've got a hunch an awful lot of people who have been here five or six or seven or ten years, whatever we knock off as newcomers, get a little bit tired of being chastised and penalized and discriminated against for having not been born here or not have been here 30 or 40 or 50 years. . . . I understand the politics of talking to the oldtimers and talking to the long-time Alaskans, but I just think that we're taking an unnecessary risk, and that if this comes back to haunt us, I think many of us on this body will wish that that provision was not in the bill. I think we ought to treat new—I think we ought to treat everybody equally as individuals and I do have that objection to the bills.

(R. 207-10)

Representative Brown, noting that a majority in the House received the maximum payment under the bill (R. 210-11), said the residency based payment was an excellent response to "constituent pressure" (R. 214) and defended the constitutionality and fairness of the bill on the ground that it was good

public policy to compensate for living in a cold climate and high cost economy (R. 220-21). Representative Brown also analogized the dividend distribution to the distribution of stock in an oil company (R. 222).

The Co-Chairman of the Free Conference Committee, Representative McKinnon, reported on the choice of 1959 as the basis for the retrospective award of dividends:

> The reason—the inability to pick a shorter time period is simply due to the fact there's no logical reason to pick a date other than 1959. If you're distributing the natural resources wealth of the State, we're faced with the question of either no—equal payments to everybody who's been here for 30 days, or tying it to the 1959, and the Committee did decide to go with the '59 date.

(R. 223-24)

The debate on the legislative package contained references to "boomers and cheechakos"[4] (remarks of Rep. Hayes, R. 234), and "Texans and Okies and different people from the Lower 48" (remarks of Rep. Hurlbert, R. 210). This legislative history demonstrates that the overriding legislative purpose for the tax exemption and permanent fund distribution system was to establish financial policies that would insulate long-time Alaskans from sharing the fruits of Alaska's development. The Alaska Supreme Court struck down the tax exemption portion of the legislative package in *Williams v. Zobel*, 619 P.2d 422 (1980) (per Dimond, J.).

B. IN ACTUAL OPERATION, THIS STATUTE AMOUNTS TO AN OPEN ENDED AND PERPETUAL DURATIONAL RESIDENCY REQUIREMENT

Any meaningful discussion of the constitutionality of this statute must begin with an examination of its operation and effect. In actuality, this statute operates as an unlimited and perpetual durational residency requirement.

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[4]The word "Cheechako" is an uncomplimentary Alaskan colloquialism for "newcomer." K. Wheeler, THE ALASKAN, 73, 175 (1977), P. Berton, THE KLONDIKE FEVER, 195 (1958).

The durational residency requirement in this statute is unprecedented in American law because of its extreme terms. It is absolute, permanent and cumulative. It is absolute in that the benefit denied one year will not be provided in the next year or at any time in the future. It is permanent in that the Alaska citizen denied a benefit because of durational residency is always denied the maximum benefit received by other Alaska citizens. The new resident never attains equality with the person who came here before him. It is cumulative in that the durational residency requirement lengthens with every year and theoretically extends into infinity. Each year this statute creates a new class of Alaska citizens who have less rights than other Alaska citizens in the revenue from the disposal of Alaska resources belonging to all Alaskans. Durational residency analysis is unquestionably appropriate.

The State has previously argued that durational residency analysis is not appropriate since the permanent fund distribution plan does not absolutely cut off new residents from any benefit. Rather, the State suggests, this case is not like ordinary residency cases because the new resident here does receive a fractional benefit.

This assertion is simply not correct. If it were, the discrimination in *Dunn v. Blumstein*, 405 U.S. 330 (1972) could have been cured by giving new residents a fractional vote. The discrimination in *Shapiro v. Thompson*, 394 U.S. 618 (1969) could have been cured by giving new residents a little welfare and the discrimination in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) could have been cured by giving new residents a little free medical care but not as much as long-term residents received. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class. *Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977).

Durational residency requirements are not invalidated simply because the Court does not like durational residency requirements. They are invalidated because they either place burdens upon or deny benefits to those persons who have most recently exercised their fundamental right of interstate

migration and because they pose a threat to the unity of the federal union. While the permanent fund distribution scheme is a little different than the ordinary durational residency classification, it suffers from exactly those same problems. New residents are being denied a benefit which the State is providing to other persons for no reason other than the duration of their residency. While it is quite clear that there is no fundamental right to receive a benefit from the State to which one migrates, there is a constitutionally protected right not to be singled out for discriminatory treatment solely because one has recently exercised a constitutional right.

In an effort to escape close judicial scrutiny, the State has argued that the appellants will somehow catch up in later years and thus, by projecting a lifetime of potential effects which, if they actually occur, might tend to minimize a present disparity of treatment, the State and the majority below conclude that a new resident cannot be properly characterized as being consistently denied parity with long-term residents. This assertion has numerous conceptual defects.

First of all, it ignores reality. If Mr. Zobel is compared to someone of his own age who was born in the State, it is quite obvious that Mr. Zobel will never catch up with that otherwise similarly situated individual. There will never be a year in which their distributions will be identical. In order for Mr. Zobel to catch up, we have to hypothesize that this other individual either dies or moves away. In that event, the two individuals are, by hypothesis, no longer similarly situated and there is no reason to expect them to receive equal funds.

As the dissent below noted, 619 P.2d at 467, this argument is no different than asserting that a new resident who is not eligible for welfare because he does not meet a one year residency requirement is not treated differently from a long-term resident who receives welfare because the former may remain in the State longer than the latter. Such an argument, of course, has been rejected in *Shapiro* and deserves no better treatment here.

A more fundamental problem with the State's analysis is that it stands equal protection theory on its head. The State

comes here to argue for the concept of "equality in the aggregate."[5] Under this incredible Orwellian concept, equal protection becomes a goal that one works his way toward. This court is asked to take a broad view of a lifetime of effects on innumerable individuals into the distant, indeed theoretically infinite, future. The concept might as well be labelled equality by increment or equality by attrition.

No one should be required to wait a lifetime for equal protection under the law. Compliance with the demands of the Fourteenth Amendment must be judged on how a program operates in the present and not what its effects might be in the infinite future. Equality in the aggregate is, by definition, inequality in the present. There can only be equality and inequality. Despite the State's rhetoric, which could have been lifted straight from the pages of ANIMAL FARM,[6] some residents cannot be "more equal" than others.

Unlike every durational residency case which this Court has ever seen, at least outside of the governmental offices category,[7] this statute is not designed as a test of the bona fides of a claim of State citizenship. Indeed, it is not a test of anything. Rather, it simply represents a State created caste system aimed solely at insuring that those persons who have most recently exercised their fundamental right of interstate migration are, as a class, perpetually accorded an inferior position.

The plan before the Court would truly revolutionize the relationship between a State and its citizenry. If it is constitutionally permissible to distribute the fruits of economic development of a State's public resources on the basis of length of residency, then the idea of equal citizenship has been

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[5]Motion of Thomas Williams, Commissioner of Revenue, and State of Alaska To Dismiss or Affirm at 10.

[6]G. Orwell, ANIMAL FARM (1946)

[7]This Court has summarily affirmed without opinion the requirement that a person must be a citizen of New Hampshire for seven years for eligibility to run for governor. *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.) *aff'd* 414 U.S. 802 (1973).

lost. A State could as easily issue fishing licenses which entitled the bearer to take one fish for every year that he had lived in the State, ration the use of the public lands based on durational residency or reserve the finest schools for the children of long-term residents.

The statute challenged in this case creates a permanent program for the annual distribution of earnings from Alaska's oil and mineral wealth. The durational residency requirement is not a "waiting period" for equal treatment in the *Shapiro* and *Sosna* sense at all. A new migrant will never catch up with someone who came before him. As the program enters 1981, the Zobels have waited one year, but that has not put them one year closer to equality with other citizens of Alaska receiving the maximum benefits. The "waiting period" in this statute is forever.

C. THIS COURT HAS NEVER APPROVED A DURATIONAL RESIDENCY REQUIREMENT OF SUCH LENGTH

This Court has never before approved a durational residency requirement of such length; nor has it ever approved either a cumulative or an unlimited durational residency requirement. This statute is both. By the year 2000, Alaskans will be divided into forty-one classes of citizens based upon the date that they moved to or were born in Alaska. The terms of the durational residency requirement imposed by the statute are unprecedented in American law. This statute imposes a more extreme durational residency requirement than any case which has ever come to this Court.

Within the context of governmental distribution programs, this Court has struck down every residency requirement imposed by the States which has come before it. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Rivera v. Dunn*, 329 F.Supp. 554 (D.Conn. 1971) (three-judge court), *aff'd mem.*, 404 U.S. 1054 (1972); *Pease v. Hansen*, 404 U.S. 70, *rev'g mem.* 157 Mont. 99, 483 P.2d 720 (1971); *Gaddis v. Wyman*, 304 F.Supp. 717 (S.D.N.Y. 1969) (three-judge court),

aff'd mem. sub. nom. Wyman v. Bowens, 397 U.S. 49 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

With the exception of the governmental office category, this Court has never approved a durational residency requirement in excess of one year. *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970) *aff'd*, 401 U.S. 985 (1971) (one year for reduced state university tuition); *Suffling v. Bondurant*, 339 F.Supp. 257 (D.N.M.) (three-judge court), *aff'd mem. sub nom. Rose v. Bondurant*, 409 U.S. 1020 (1972) (six-month residency for admission to the State Bar);[8] *Sosna v. Iowa*, 419 U.S. 393 (1975) (one year residency for divorce).

The longest durational residency requirements which have been approved by this Court have been within the governmental office category. This Court summarily affirmed without opinion the requirement that a person must be a citizen of New Hampshire for seven years for eligibility to run for governor. *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H.), *aff'd* 414 U.S. 802 (1973). But even in this area the durational residency requirements have been finite and limited in their scope, unlike the residency requirement at issue in this case.

In those cases where this Court has rendered a decision establishing that durational residency requirements are constitutionally permissible, they have been either as indicia that one is a bona fide resident, *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973), or to protect a State in the exercise of its domestic relations jurisdiction. *Sosna v. Iowa*, 419 U.S. 393, 406-09 (1975). It has never before been questioned that durational residency requirements must be reasonable in length and that, once the minimum or threshold requirement has been satisfied, all citizens must be treated equally. Durational residency requirements, when permissible, must be in the nature of a reasonable, finite threshold requirement. *Vlandis v. Kline*, 412 U.S. at 452; *Dunn v. Blumstein*, 405 U.S. 330,

[8] *Compare Webster v. Wofford*, 321 F.Supp. 1259 (N.D. Ga. 1970) (three-judge court) (one year residency requirements for admission to the State Bar struck down), *with Suffling v. Bondurant*, 339 F.Supp. 257 (D.N.M.) (three-judge court), *aff'd mem. sub nom. Rose v. Bondurant*, 409 U.S. 1020 (1972) (six-month residency requirement for admission to the Bar approved).

363 (1972) (Burger, C. J., dissenting) (approving reasonable periods); *Shapiro v. Thompson*, 394 U.S. 618, 644, 646, 648 (1969) (Warren, C. J., dissenting) (approving minimal residency requirements); 394 U.S. at 677 (Harlan, J., dissenting) (approving residency requirements that are not excessive).

II. AN UNLIMITED DURATIONAL RESIDENCY REQUIREMENT WHICH CREATES A PERPETUAL INEQUALITY IN THE RECEIPT OF A SUPPLEMENT TO PERSONAL INCOME FROM PUBLIC RESOURCES MUST BE SUBJECTED TO STRICT SCRUTINY

A. THE STATUTE IS A PENALTY ON THE RIGHT OF INTERSTATE MIGRATION

For more than a century, this Court has recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to protect a person in his right to travel, migrate, resettle, find a new job and start a new life without suffering legal disabilities. *Passenger Cases*, 48 U.S. (7 How.) 300, 518 (1849); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1868); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Edwards v. California*, 314 U.S. 160 (1941); *United States v. Guest*, 383 U.S. 745, 757-59 (1966); *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 634 (1969); *Oregon v. Mitchell*, 400 U.S. 112, 238-39 (separate opinion of Brennan, White, and Marshall, J.), 285-86 (opinion of Stewart, J., concurring and dissenting, with whom Burger, C. J., and Blackmun, J., joined) (1970); *Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254-55 (1974).

In 1873, Justice Miller said that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873) *Accord, Oregon v. Mitchell*, 400 U.S. at 285-86 (opinion of Stewart, J. concurring and dissenting, with whom Burger, C. J. and Blackmun, J., joined).

In *Shapiro v. Thompson*, the Court recognized that durational residency classifications distinguished between the citizens of a State on the basis of recent migration and that conditioning the receipt of governmental rights and benefits upon whether a person has exercised a fundamental right penalizes that right. *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958). If a State is to be allowed to classify on the basis of the "virtually unconditional personal right" to interstate migration,[9] the State has the burden of demonstrating that the classification is necessary to promote a compelling governmental interest. *Memorial Hospital v. Maricopa County*, 415 U.S. at 262; *Dunn v. Blumstein*, 405 U.S. at 339; *Shapiro v. Thompson*, 394 U.S. at 634. *See also Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977).

The ultimate parameters of *Shapiro's* penalty analysis have never been fully articulated. One court has defined a penalty as a disadvantage, loss or hardship due to some action. *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 811 (1st Cir. 1970). This Court has found unconstitutional penalties in the levying of a one dollar tax on interstate travel, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868) or in the denial of unemployment compensation to a person who would not work on Saturday because of her religion. *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 648 (1974) the Court held that a mandatory maternity leave policy "unduly penalize[d] a female teacher for deciding to bear a child."

The fact that the program before the Court in this case is a novel one is of no importance in deciding whether the extreme durational residency requirement it contains amounts to a penalty on interstate migration. Even though citizens who have migrated to Alaska since 1959 will get a benefit not received in other States, this is not relevant in determining whether the classification is a penalty upon the exercise of the

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[9] *Shapiro v. Thompson*, 394 U.S. at 643 (Stewart, J., concurring); *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978) (dicta); *Califano v. Torres*, 435 U.S. 1, 4 n. 6 (1978) (per curiam) (dicta).

right to migrate. *Strong v. Collatos*, 593 F.2d 420, 422 (1st Cir. 1979); *Barnes v. Board of Trustees*, 369 F.Supp. 1327, 1337 (W.D.Mich. 1973) (three-judge court).

> [T]he determination of whether a limited benefit program "penalizes" the exercise of a constitutional right is to be made by comparing the limited program, not with the constitutionally tolerable absence of any program, but with a program that does not contain the challenged exceptions. The focus is on the *exceptions* to the benefit program rather than on any penalizing effect of the limited program as a whole. Such exceptions may not be triggered by the exercise of a constitutional right unless the State has a compelling interest for making the exceptions.

N. Dorsen, P. Bender, B. Neuborne and S. Law, EMERSON HABER AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, Vol. II at 271 (4th ed. 1979) (emphasis in original)

Shapiro cautioned that some "waiting period[s]. . . may not be penalties upon the exercise of the constitutional right of interstate travel." 394 U.S. at 638 n. 21. *Memorial Hospital* stated that in determining the burden of justification a durational residency classification must meet, the Court will look to "the nature of the classification and the individual interests affected." 415 U.S. at 253.

This statute contains an unlimited and perpetual durational residency classification which denies an equal share in the monetary benefits derived from the sale of the State's publicly owned resources[10] to all residents who have not lived in the State since 1959. Such a permanent denial of such important benefits solely on the basis of the time of interstate migration is a penalty on the right to migrate of profound proportions.

1. The Nature Of The Classification

Shapiro referred to the durational residency requirement before it as a "waiting-period requirement." 394 U.S. at 626,

[10]A portion of federal mineral revenue sharing payments and bonuses received by Alaska are also deposited in the Permanent Fund.

627. The new migrant had to wait for a period of time (one year) and then was granted equal treatment with all other citizens in the State. The Court held that even this one year waiting period for equal treatment was a penalty on the right to interstate migration.

All of the previous durational residency cases reviewed by this Court have involved durational residency requirements of a finite and comparatively short duration. *Shapiro v. Thompson, supra, Dunn v. Blumstein, supra, Memorial Hospital v. Maricopa County, supra, Sosna v. Iowa*, 419 U.S. 393 (1975). These requirements are properly called "waiting periods." They are not automatically unconstitutional. Where proof of bona fide residency is difficult, they may be held not to penalize interstate migration. Thus the Court in *Vlandis v. Kline*, 412 U.S. 441, 452 (1973), noted that "special problems [are] involved in determining the bona fide residence of college students who come from out of State to attend [a] public university. . . " since those students are characteristically transient. *See Starns v. Malkerson*, 326 F.Supp 234 (D.Minn. 1970) *aff'd*, 401 U.S. 985 (1971). It is generally assumed that some waiting period may be imposed in these circumstances as a test of the *bona fides* of a claim of state residency.

Similarly, a petitioner for a divorce must be a domiciliary of a State before that State can constitutionally exercise jurisdiction over the divorce. *Williams v. North Carolina*, 325 U.S. 226 (1945). Such decrees are subject to collateral attack if there is any question of domicile and therefore this Court in *Sosna v. Iowa* found a one-year waiting period for filing for a divorce to be a permissible requirement that did not penalize a new migrant's right to travel. 419 U.S. at 406-407.[11]

The durational residency requirement used for the annual distribution of earnings from Alaska's oil and mineral wealth is not a "waiting period" for equal treatment in the *Shapiro* or *Sosna* sense at all. The classification before the Court is a

[11]For an excellent summary and analysis of the Court's previous cases on durational residency requirements see Note, *Durational Residence Requirements From Shapiro Through Sosna: The Right To Travel Takes A New Turn*, 50 N.Y. U. L. Rev. 622 (1975).

greater penalty on the exercise of the right to migrate than a waiting period because it relegates the new migrant to a permanent legal status of inferior quality solely because of the time of migration.

The historical function of this Court in providing protection against penalties on the fundamental right to migrate cannot be separated from protecting the persons who exercise that right once they arrive in their new State. The statute before the Court would transform the right to travel into a ticket to a permanent second-class status by creating a permanent underclass of residents who have migrated to Alaska since 1959. Permanent legal disabilities placed upon those persons must be held to be a penalty on the right to migrate.

Such a durational residency classification takes on some of the same attributes of an alienage or national origin classification. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); *In re Griffiths*, 413 U.S. 717 (1973); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Oyama v. California*, 332 U.S. 633 (1948). U. S. citizens from other States have a right to enter and "abide 'in any state' in the Union on an equality of legal privileges with all citizens under non-discriminatory laws." *Graham v. Richardson*, 403 U.S. at 374 (citing *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948). Alaska does not overtly fence out new residents but as those migrants cross the Alaskan border they receive a number that will determine their legal status under this program forever. The new migrant is powerless to change that status.

Justice Rehnquist in his dissent in *Nyquist v. Mauclet*, discussed the characteristics of an alienage classification which cause this Court to apply strict scrutiny:

> [A]liens residing in this country necessarily are subject to a period of time during which they *must* bear this *status* of an "alien." If a classification therefore places aliens in one category, and citizens in another, then, thereafter, every entering resident alien must pass through a period of time in the country during which he falls into the one category and not the other. *Nothing except time* can remove him from his identified status as an "alien" and

> from whatever associated disabilities the statute might place on one occupying that status. In this sense, it is possible to view aliens as a discrete and insular minority, since they are categorized by a factor beyond their control.
>
> The prior alienage cases from this Court, utilizing strict scrutiny to strike down state statutes, all dealt with statutes where the line drawn necessarily suffered that infirmity: in all of those cases, *the line drawn necessarily left incoming resident aliens afflicted with the disability for some period of time. Nothing except the passage of time could remove the alien from the classification and the disability.* The statutes, therefore, involved the precise infirmity which led this Court to accord aliens "suspect classification" treatment. The line drawn by the legislature was drawn on the basis of a *status, albeit temporary, that the included members were powerless to change.*

432 U.S. 18-19 (Rehnquist, J., dissenting) (emphasis added). A permanent durational residency classification is even more invidious than the ones discussed by Justice Rehnquist because not even the passage of time will remove the legal disability placed on new residents. In addition, a permanent durational residency classification raises fundamental questions about the unity of this country which are not suggested by an alienage classification.

The relationship between the protection of the fundamental right to travel and the protection of those persons who have exercised that right has caused some commentators to analyze the underlying policy of *Shapiro* and its progeny as the protection of new migrants from class legislation. *See, e.g.* McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vand. L.Rev. 987 (1975). New residents have been subjected to "a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)

> Certainly "newcomers" as a class are almost always a minority in the governmental unit, unable to protect their interests through the political process. The fact that one remains a member of the class only for a certain period of time, gradually acquiring the perspective and vested interests of the "old-timers", assures the continuance of both the minority status and the political impotence of the "newcomer" class.
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> * * *
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> Common experience indicates that something in the basic nature of man, some chauvinistic instinct, causes him to band together into groups of "insiders", which then cultivate a sense of security by fervently and irrationally discriminating against "outsiders". Newcomers are certainly among the most common victims of this discriminatory instinct. From the earliest loose associations of child playmates, through the social cliques of high school and the fraternities and sororities of college, to the political organizations on the local, state and national level, newcomers have traditionally suffered discrimination simply because they are newcomers. As with other psychological phenomena, varied and complex explanations are possible, but the tendency to discriminate against newcomers is verified by experiences in everyone's life. Such a minority would seem to be a particularly appropriate subject for the special protection afforded suspect classes like blacks and aliens.

McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vand. L. Rev. 987, 1018, 1019-20 (1975).

This statement is especially true in the State of Alaska where the legislature is dominated by long-time residents[12] and new residents are presently and historically have been subjected to a host of statutes which discriminate against

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[12]Art. 2, §2 of the Alaska Constitution imposes a three-year durational residency requirement for candidacy for the legislature. This requirement was upheld in *Gilbert v. State*, 526 P.2d 1131 (Alaska 1974). During the debate on the Permanent Fund Distribution Act reference was made to the fact that a majority of the members of the House would get the maximum payment. (Remarks of Rep. Brown, R. 210-11).

them.[13] Whether the permanent durational residency requirement is analyzed as a penalty on the fundamental right to migrate or as class legislation directed at a discrete and insular minority that have exercised that right, it is a classic example of the kind of invidious discrimination the equal protection clause prohibits.

The principles of *Shapiro, Dunn* and *Memorial Hospital* apply with special force to a classification which permanently denies U. S. citizens who migrate to a State the treatment given other citizens of that State. Classifications which created permanent unequal treatment for some bona fide residents of a State have previously been declared invalid by this Court. *Vlandis v. Kline*, 412 U.S. 441 (1973) declared invalid a classification which prevented students who migrated

[13]Alaska Stat. §47.25.020 requires 15 continuous years of residency for special housing and other assistance for the destitute elderly. Alaska Stat. §47.25.035 imposes a 30 year residency requirement for the same benefits when residency has not been continuous for 15 years. Alaska Stat. §47.05.010 provides special assistance for the elderly who have resided in the State for 25 continuous years. Alaska Stat. §38.05.058 provides discounts on the purchase of State land up to 75 percent of the value of the land for each year of residency. Alaska Stat. §26.15.130 requires five years residency for veteran's housing loans. Alaska Stat. §16.10.310 requires five years residency for commercial fishing loans. The following cases have considered other efforts of the State of Alaska to exclude non-residents and new residents from the fruits of Alaska's development. *Mullaney v. Anderson*, 342 U.S. 415 (1952) ($5.00 fee on resident commercial fisherman and $50.00 fee on non-resident commercial fisherman violates Privileges and Immunities of the United States Constitution); *Brown v. Anderson*, 202 F.Supp. 96 (D.Alaska 1962) (three-judge Court) (Act authorizing closing of commercial fishing areas to non-residents violates both the Privileges and Immunities Clause and the Commerce Clause); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (one year durational residency requirement for State employment preference violates equal protection); *Lynden Transport, Inc. v. State*, 532 P.2d 700 (Alaska 1975) (discrimination against non-resident motor carriers violates equal protection); *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977) (one year durational residency requirement for employment on Alaska Pipeline violates equal protection, residency requirement upheld) *rev'd* 437 U.S. 518 (1978) (residency requirement for employment on Alaska Pipeline violates privileges and immunities); *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (State land disposal based on durational residency up to ten years unconstitutional on other grounds); *Williams v. Zobel*, 619 P.2d 422 (Alaska 1980) (taxing the income of only residents of three years duration or less violates equal protection).

into a State from ever being granted equal treatment for tuition purposes, even though they were unquestionably bona fide residents. In *Carrington v. Rash*, 380 U.S. 89, 96 (1965), a classification which prevented a soldier from ever obtaining an equal vote with other bona fide residents of Texas was declared invidious and in violation of the Fourteenth Amendment. At least the deprivations in *Vlandis* and *Carrington* could be avoided by changing one's status as a student or soldier for one year. New migrants to Alaska cannot escape the legal disability created by the statute before the Court.

A durational residency classification which operates in this fashion is not "cognizable under a Constitution which was written partly for the purpose of eradicating such provincialism." *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 813 (1st Cir. 1970). *See also Edwards v. California*, 314 U.S. 160, 174 (1941). The constitutional minimum is that a new migrant to a State has to be treated equally at some point and that a perpetual distinction between citizens of a State on the basis of the time of migration is *per se* a penalty on interstate migration without reference to the right or benefit denied. However, in the case before the Court the individual benefits and rights denied are of significant importance.

2. Individual Interests Affected

Because of the huge surplus revenues in the Alaska treasury, the State legislature has decided to directly distribute a portion of the monetary benefits from the sale of the State's publicly owned resources directly to all of its citizens. The monetary benefits are a valuable supplement to each Alaskan's personal income because of the high cost of living in Alaska. The Alaska Department of Revenue has estimated that $479,000,000.00 will be distributed annually by 1986. *Williams v. Zobel*, 619 P.2d 467 n.4 (1980) (Dimond, J., dissenting).

Both this Court and the lower courts have consistently struck down durational residency requirements of even relatively short duration when States have imposed them as a qualification for public monetary and economic benefits of all

types. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (non-emergency medical care); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare); *Strong v. Collatos*, 593 F.2d 420 (1st Cir. 1979) (veterans benefits); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2nd Cir.) *cert. denied*, 404 U.S. 863 (1971) (housing); *Cole v. Housing Authority of The City of Newport*, 435 F.2d 807 (1st Cir. 1970) (housing); *Barnes v. Board of Trustees*, 369 F.Supp. 1327 (W.D.Mich. 1973) (three-judge court) (veterans assistance); *Baxter v. Birkins*, 311 F.Supp. 222 (D.Colo. 1970) (three-judge court) (ADC benefits); *Sheard v. Department of Social Welfare*, 310 F.Supp. 544 (N.D.Iowa 1969) (three-judge court) (old-age assistance).

The direct monetary benefits under this program can be used for any purpose including food, shelter, clothing, medical care or fuel. The fact that Alaska has placed the label "permanent fund dividends" upon its share-the-wealth program cannot obscure the social welfare purpose served by it. Whether this economic assistance is called welfare, dividends or gifts[14] matters little to the new resident who finds he endures the same high cost of living as his neighbor who has just received a thousand dollar check from the State. The social welfare purpose served by Alaska's permanent fund distribution program was recognized by the Alaska Legislature in section one of the act when it declared that:

> State residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's

[14]The term "gift" seemed most appropriate to at least one legislator. Representative Martin in urging support for the bill said, ". . . we had snow yesterday, that reminded me of Christmas. And then I felt that, 'By golly, yeah, Christmas is almost here, and the people have got to receive a present.' And this is nice, at long last Alaska, everyone, receives an equal present. . . . So in conclusion, I'd like to repeat an old message from a friend of ours, old Scrooge, who says, Merry, Merry Christmas to all and to all a good night! So let's vote on this unanimously." (R. 227-28) It seems not to have occurred to Rep. Martin that his desire to give Alaskans an *equal* present is not served by the durational residency based distributions.

> income from oil, gas, and other mineral production to help offset rising fuel costs.

§1(d), Chap. No. 21, Laws of Alaska, 1980.

Representative Brown argued in favor of the direct monetary distribution program because "the cost of living here is higher, the cost of transportation is higher. Even if we got rid of many of the other things that cause it, just the fact of our environment would still keep our cost of living higher than most states." (R. 221).

One defendant, Commissioner of Revenue Thomas Williams, recognized the importance to the State's residents of this supplement to personal income when he told this Court by Affidavit:

> It is my firm impression that residents of these outlying communities are depending on these dividends to defray a significant portion of their living expenses for the upcoming winter. While many of the residents in these outlying communities maintain a limited subsistence lifestyle, they depend heavily upon cash during the harsh Alaskan winter when relatively few wildlife resources are available upon which to subsist and when expensive energy needs are the greatest. Simultaneously, it is a well known fact of the seasonal Alaskan economy that fewer jobs, and thereby less cash income, are available to these residents in the winter. Thus, the relative value of these dividends to Alaskans situated in the outlying communities is much greater in the winter than in other seasons when subsistence resources are more abundant and a stronger economy exists to provide jobs and needed income. While the relative impact between a wintertime distribution and one at some other time of the year for residents of urban Alaska communities is not as great, the cost of fuel and other forms of energy of these residents during the long, cold Alaska winters is a significant cost of living which these residents, too, are counting on their dividends to help offset.

Affidavit of Thomas K. Williams, p.5 attached to Opposition of the State of Alaska to the Application for Stay of Mandate of the Supreme Court of the State of Alaska.[15]

If the halt in distribution ordered by this Court in November, 1980, caused the hardship, disadvantage and loss sworn to by the defendant, then the operation of this program through the years will annually cause the same deprivation for the new residents of Alaska who face the same high cost, seasonal economy described in the affidavit, but who will receive a small fraction of the benefits given to long-time residents.

In determining whether the permanent denial of an equal share in these unconventional monetary benefits penalizes the new migrant on the basis of the exercise of a fundamental right, the Court below and the State of Alaska have mechanically limited the principles of *Shapiro* and *Memorial Hospital* to "basic necessities of life" and therefore summarily declared that those cases have no application to the program before the Court. The state has argued that the Permanent Fund dividend program is not premised on need and therefore *Shapiro* does not apply. It has also argued that denial of an equal dividend will not deter new migrants and therefore is not a penalty on migration. The State and the Court below are in error for several reasons.

Memorial Hospital and *Shapiro* did not limit the penalty analysis to "necessities of life." They declared the denial of welfare and medical assistance for one year to be clearly penalties. The State is apparently arguing that those cases only have application to statutes where the State has limited the distribution of its largesse to those in need. Need has no meaning in a context where a State has decided to give all of its citizens a supplement to their income solely on the basis of length of residency. Acceptance of the State's position could lead to a rather startling result. This Court has already held that there is no substantive right to "basic necessities." *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970). The State's position would mean that a State could completely avoid *Shapiro* by

[15]Attorney General Avrum Gross told the Superior Court that distribution of the benefits of oil development is a "strange problem" and that it is "nonetheless difficult in trying to find an equitable and reasonable way to distribute benefits to needy people." (R. 286).

abolishing need-based welfare programs and channeling its largesse through a distribution program based solely on length of residency.[16]

The State's arguments based upon deterrence of migration are similarly fallacious. As this Court said in *Dunn v. Blumstein*, 405 U.S. at 339-41 and *Memorial Hospital v. Maricopa County*, 415 U.S. at 257-58, the *Shapiro* penalty analysis is not dependent upon a finding of actual deterrence caused by a durational residency requirement. This Court said that such an argument was a "fundamental misunderstanding of the law." The penalty on interstate migration is determined by looking to how the new migrant is treated once he arrives, not whether he was deterred. There is no need to discuss a hypothetical injury to a hypothetical future traveler. The appellants in this case have suffered a real and present injury solely because they exercised their constitutionally guaranteed right of interstate migration. Certainly those citizens who have come to Alaska since 1959 could not have been deterred by a law passed in 1980, but that does not change the deprivation they are now suffering because they exercised their right to come to Alaska at a later time.

Even if the "necessities" argument were accepted, *Shapiro* and *Memorial Hospital* involved durational residency requirements of one-year in length. The court below is in error when it holds that, in all other governmental benefit programs, the States are free to impose unlimited durational residency periods. As the dissent below said, "If such treatment were permissible the requirement that durational residency periods be reasonable and limited in scope would lose most of its meaning." *Williams v. Zobel*, 619 P.2d 448, 466 (1980) (Dimond J., dissenting).

There is one other independent reason that the statute has such a severe impact on a new resident's interests that it must

[16]That such a result is politically impossible and therefore an idle fear is contradicted by the fact that Alaska presently has special housing and assistance programs for the elderly that are limited to persons who have lived in the State for as long as 30 years. Alaska Stat. §47.25.020-.035, Alaska Stat. §47.45.010.

be held to be a penalty on interstate migration and subjected to strict scrutiny. The revenues in the Alaska Permanent Fund do not come from any individual contributions. Instead they come primarily from the sale of publicly owned resources held in trust for all the people of the State, including new residents. The distribution statute is therefore a determination of the right that each citizen has to publicly owned natural resources in a property law sense.

Section 1(c) declares that the statute "fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood." This is in effect a determination that the oil, gas and mineral resources of the State, including the largest oilfield in North America, is primarily owned by long-time residents of the State and that new migrants to the State will permanently be denied an equal share in those resources. For the Court to allow this kind of redistribution of public resources solely on the ground of length of residency would sanction a severe penalty upon migration and make possible massive raids on the resources of public land States through the device of a durational residency classification.[17]

When a state holds in trust a resource which is owned by the general public, this Court should look with considerable skepticism upon any governmental schemes which will have the effect of reallocating that resource to a privileged portion of the public or subject public property to the self-interest of private parties. *See Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

The Alaska Supreme Court has previously stated what is true of any public land State, "The framers of our state con-

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[17]Alaska has already attempted to distribute public land on the basis of lengthy durational residency requirements. *See Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (State land disposal based on durational residency up to ten years unconstitutional on other grounds). Large discounts on the sale of public lands in Alaska are allowed at present for each year of residency. Alaska Stat. §38.05.058.

stitution were united in the view that the lands and other natural resources of this abundant State are among its most prized assets." *Moore v. State*, 553 P.2d 8, 30 (Alaska 1976). For a State to deny permanently an equal share in the State's greatest asset is certainly as serious a deprivation as a one-year denial of welfare or non-emergency medical care. It cannot be permitted in a country which is premised upon unity and which seeks to protect the free movement that makes such unity possible.

B. THE STATUTE SHOULD BE SUBJECTED TO STRICT SCRUTINY AS A DEPRIVATION OF EQUALITY OF CITIZENSHIP

In *Shapiro v. Thompson*, 394 U.S. 632-33 (1969) this Court held that equal protection forbids a State from apportioning benefits and services according to the past tax contributions of its citizens. One reason that equal protection forbids such an apportionment is that the first sentence of the Fourteenth Amendment contains a specific textual guarantee of State citizenship to all persons who are bona fide residents of a State.

Prior to the enactment of the Fourteenth Amendment, the constitution left it entirely to the State to determine the criteria for and the attributes of State citizenship. A State was perfectly free to discriminate among its citizens by granting certain classes of citizens, property holders for example, various rights while withholding them from others. *See, Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1857); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833). Conversely, criteria established by the State to qualify for State citizenship were entirely irrelevant in determining the meaning of "citizen of a State" for purposes of the Federal Constitution. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-06 (1857).

The first sentence of the Fourteenth Amendment was designed to overrule *Dred Scott* and to give the concept of State citizenship a federal component. The nature of this new substantive right was soon spelled out in the *Slaughter-House Cases*, 83 U.S. at 80.

> It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.

Accord, Oregon v. Mitchell, 400 U.S. 112, 285-86 (opinion of Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined) (1970).

Justice Bradley, while dissenting on other grounds, put the case for this new substantive right even more firmly:

> The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and abide in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. . . . If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

83 U.S. at 112-13.

Bona fide residence has become synonymous with State citizenship. *Blake v. McClung*, 172 U.S. 239, 247 (1898). By the terms of the Fourteenth Amendment, all persons born or naturalized in the United States are explicitly citizens of the State in which they reside. *Milliken v. Meyer*, 311 U.S. 457, 463-464 (1940).

The Fourteenth Amendment forbids a State from totally denying State citizenship to a citizen of the United States residing within its borders. Classifying persons who are undoubtedly State citizens solely on the basis of when they attained their citizenship is equally offensive.[18] The Fourteenth Amendment grants both Federal and State citizenship in terms of unmistakable clarity. It creates a specific, inviolable

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[18]Appellants are not arguing that the grant of state citizenship carries any specific affirmative entitlements. Resolutions of that question can wait for another day. Instead, they simply assert that, at a minimum, the grant operates as a limitation on the power of the States to classify as between *bona fide* residents.

relationship between the citizen and the State.[19] "Once acquired, this Fourteenth Amendment citizenship was not to be

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[19]Underlying the concept of citizenship in the United States is the tenet that the relationship between the State and its citizens is like a contract.

> This well known doctrine presumes that all men once existed in a state of nature; that they eventually came together to form a government to satisfy their mutual needs; and that the resultant agreement, which substituted civil rights for natural rights, was a social contract.

E. K. Bauer, *Commentaries on the Constitution 1790-1860* at 254 (1965). From the writing of the Mayflower Compact to the present, the concept of a consensual joining together of persons to form a contractual government is fundamental to our constitutional law and philosophy.

As in any contract, the contract between the citizens and the state implies reciprocal obligations between the parties; the citizen gives up certain natural rights to obtain the protections of the state. *Luria v. United States*, 231 U.S. 9, 22 (1913). One of the natural rights a citizen gives up in contracting with the state is the right to be treated differently from other citizens, in return for the undifferentiated protection of his own interests. DeTocqueville called this expectation of equality in citizenship the highest passion of Americans:

> I think that democratic communities have a natural taste for freedom: left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible: they call for equality in freedom; if they cannot obtain that, they still call for equality in slavery. They will endure poverty, servitude, barbarism—but they will not endure aristocracy.

A. DeTocqueville, Democracy in America in *Sources of Democracy* 77 (S. Padover ed. 1973). Thus, the American citizen expects the right to approach the state without regard to the quality of his or her citizenship: to establish citizenship means to join on equal footing with all other citizens.

The American passion for equality in citizenship is a reflection of historical western thought. Samuel Puffendorf, whose works greatly influenced John Locke, wrote in 1688:

> [H]owever much one man may excel others in mental and bodily gifts, he is none the less bound to exercise toward them the duties of natural right, and he may expect the same of others as well, nor for all his gifts, is he allowed any greater license to injure others. Thus, however niggardly nature or fortune has been toward a man, he is not condemned on that score to share less fully than others in the benefits of the law. But whatever one man can claim or hope for from another, the same others can claim or hope for from him, other things being equal, and whatever law a man appeals to against another, he must under every circumstance admit against himself.

[footnote continued]

S. Puffendorf, "De Jure Naturae er Gentium Libri Octo in *Classics of International Law* 332 (J. B. Scott, ed.) (1934)." Similarly, J. Rousseau's *Social Contract* stated that rational and natural basis for equality in standing in citizenship:

> We are bound then to distinguish clearly between the respective rights of the citizen and the Sovereign, and between the duties the former have to fulfill as subjects, and the natural rights they should enjoy as men.
>
> . . . .
>
> The undertakings which bind us to the social body are obligatory only because they are mutual; and their nature is such that in fulfilling them we cannot work for others without working for ourselves. . . . There is not a man who does not think of 'each' as meaning him. . . . This proves that equality of rights and the idea of justice which such equality creates originates in the preference each man gives to himself, and accordingly in the very nature of man.

J. Rousseau, *The Social Contract and Discourses*, 28-29 (1950).

When these philosophical constructs gave birth to the French and American revolutions, they found a civil and legal voice. Equal stature of citizenship gained explicit recognition in the constitutions of both France and the United States. In France the prohibition against classification of citizenship was explicit:

> The law is an expression of the will of the community. . . It should be the same to all, whether it protects or punishes; and all being equal in its sight, are equally eligible to all honors, places, and employments, according to their different abilities, without any other distinction than that created by their virtues and talents.

French Declaration of the Rights of Man and of the Citizen (1789) in *Sources of Democracy* 325-326 (S. Padover ed. 1973).

In the American Constitution, on the other hand, Article I, Section 9 states simply "No title of nobility shall be granted in the United States." A corroborative insight into the values behind this stark statement, however, provided by the Virginia Bill of Rights (1776), makes clear that the values underlying the titles of nobility clause were the same as the French Consitution.

> [N]o man, or set of men, are entitled to exclusive or separate emoluments, or privileges from the community, but in consideration of public service.

Virginia Bill of Rights (1776) in *Sources of Democracy*, 302-304 (S. Padover ed. 1973).

The doctrine of equal stature in citizenship maintains such a strong hold on American values that it is a basic aspect of our exported doctrine. After World War II, when the United States had great influence over the drafting of the Constitution of Japan, this clause was inserted:

> All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin.

[footnote continued]

shifted, cancelled, or diluted at the will of the federal government, the States or any other governmental unit." *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967).[20]

This grant of State citizenship does not mean that neutral criteria unrelated to the quality of one's citizenship may not be used to condition access to State benefits. For example, clearly welfare benefits can be limited to those who are in need of them. However, if a welfare program is to be implemented then the benefits must be extended to all State citizens who need them. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Given the substantive federal content of the concept of State citizenship, a State's power to impose durational residency requirements should be limited to testing for bona fide residence. Once a permissible waiting period has been satisfied, the States should be powerless to impose classifications based upon length of residence. The State has no legitimate interest in so distinguishing between persons whose right of State citizenship is anchored in the Fourteenth Amendment.

In *Dunn v. Blumstein*, 405 U.S. 330, 354 (1971), this Court recognized this concept when it stated:

> [T]he State appears to confuse a bona fide residence requirement with a durational residence requirement. As already noted, the State does have an interest in limiting the franchise to bona fide members of the community. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residence is questioned, but because they are recent rather than longtime residents.

Peers and peerage shall not be recognized.

No privilege shall accompany any award of honor, decoration or any distinction.

Kenpo (Constitution) Chapter III, Article I.

[20]It has been said, in a related context, that "[c]itizenship obtained through naturalization is not a second-class citizenship." *Knauer v. United States*, 328 U.S. 654, 658 (1946).

The durational residency requirement which is before this Court is not a litmus test for citizenship. Indeed, it is not a test of anything. As this Court held in *Shapiro*, equal protection forbids such an attempt to apportion benefits between new and old citizens.

III. THE ASSERTED PURPOSES OF THE ALASKA PERMANENT FUND DISTRIBUTION ACT'S DURATIONAL RESIDENCY CLASSIFICATION ARE NOT PERMISSABLE, NOT COMPELLING NOR ARE THEY EVEN RATIONALLY RELATED TO IT

When legislative classifications implicate a fundamental right, such as interstate migration, such governmental action may withstand constitutional scrutiny only when the State meets its burden by a clear showing that the statutory scheme is precisely tailored to further a compelling governmental interest. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963).

A State may not use a durational residency classification if the same objective could be reached by less restrictive means. *Barnes v. Board of Trustees*, 369 F.Supp. 1327, 1335-36 (S.D. Mich. 1973) (three-judge court); *See NAACP v. Button*, 371 U.S. 415, 438 (1963); *Sheldon v. Tucker*, 364 U.S. 479, 488 (1960). When no suspect criterion or fundamental right is involved, the classification must nonetheless be reasonable, not arbitrary, and rationally and fairly related to a permissible government objective. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). The factor which is the basis for differentiating between persons may not be capricious or irrelevant. It must be germane to the effectuation of the State's legitimate interests. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533-35 (1973); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

The Alaska Supreme Court and the defendants have spent much time below explaining the beneficial objects of the Alaska Permanent Fund and the subsequently enacted system of direct distribution of earning. These explanations miss the

point. The State must show that the durational residency classification itself, not the beneficial purposes of the Permanent Fund or the distribution statute as a whole, serve compelling, or at least valid State interests. *Barnes v. Board of Trustees*, 369 F.Supp. at 1336. The Alaska Permanent Fund is a unique device for saving some of Alaska's oil wealth for the future needs of the State. The appellants are not challenging the existence of the Permanent Fund. The Fund was created four years before the distribution statute was enacted and the mandatory savings plan will continue to operate no matter what happens in this litigation.

Likewise, the State and the Court below praise the virtues of limiting government growth by directly distributing public money to the State's citizens. The appellants have not challenged the direct distribution system itself and regard its creation to be within the province of the legislature.[21] The appellants also concede the constitutional validity of limiting dividend payments to bona fide residents of Alaska. But the saving of Alaska's oil wealth and limiting the "painless" growth of the Alaska State government have absolutely nothing to do with the radical durational residency-based distribution challenged in this litigation.

Three purposes are asserted as justification for the durational residency based distribution and its retroactivity to 1959, the year of Alaska Statehood. They are listed in the statute itself:

> (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the State's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

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[21]Because of the non-severability provision of §4 of the Act, if the durational residency based distribution is declared unconstitutional the entire distribution system is of no force and effect and the legislature would have to pass a new law if it wished to continue the direct distribution system. This section indicates that the Legislature was more interested in distributing money disproportionately to long-term residents than distributing money as a check on government growth.

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the State; and

(3) to encourage increased awareness and involvement by the residents of the State in the management and expenditure of the Alaska permanent fund.

§1, Chap. No. 21, Laws of Alaska (1980).

A. DISTINGUISHING BETWEEN NEW AND OLD RESIDENTS FOR THE PURPOSE OF COMPENSATING FOR CONTRIBUTIONS TO THE STATE IS NOT A PERMISSIBLE GOVERNMENTAL OBJECTIVE

The State has argued that "an equitable distribution" means rewarding longer-term residents for their contributions to the State. The majority below was clearly in error when it accepted the State's argument that the durational residency based distribution could be justified by the purpose of awarding past contributions, intangible or tangible, to the State. This Court on at least two occasions has held that a State may not allocate its resources or services to its longer-term residents on a past contributions rationale. Thus, in *Shapiro* the Court stated:

> Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. . . . Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of State services.

394 U.S. at 632-33

In *Vlandis v. Kline*,[22] the Court indicated that a reasonable durational residency requirement could be used in some circumstances "as one element in demonstrating bona fide residence." 412 U.S. at 452. The Court went on to reject the State's argument that past contributions in taxes could justify a distinction between old and new bona fide residents.

> But even if we accepted the State's argument that its statutory scheme operates to apportion tuition rates on the basis of old and new residency, that justification itself would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment. For in *Shapiro v. Thompson, supra,* the Court rejected the contention that a challenged classification could be sustained as an attempt to distinguish between old and new residents on the basis of the contribution they have made to the community through past payment of taxes.

412 U.S. at 450 n.6.

There are weighty considerations for not allowing a State to justify durational residency classifications on the ground of past contributions. Acceptance of such a rationale would remove even the mildest limits on durational residency classifications and lead to a "pervasive and profound inequality in nearly all phases of a State's relationship with its citizens." *Williams v. Zobel,* 619 P.2d 422, 429 (Alaska 1980) (per Dimond, J.). The arbitrary use of the power to classify some of a State's citizens is even more possible with use of the vague "past intangible contributions" argument. It is little more than a deliberate decision by the State that long-term residents are its more worthy citizens and entitled to special legal privileges denied other citizens.[23]

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[22]Since the rejection in *Vlandis* in 1973 of the "past contributions" rationale this Court's summary affirmance in *Starns v. Malkerson,* 401 U.S. 985 (1971) *aff'g mem.*, 326 F. Supp. 234 (D. Minn. 1970) stands only for the proposition that a one-year durational residency requirement is permissible in some circumstances.

[23]The irrational prejudice toward new residents that is at the root of the view that long-term residents naturally deserve more legal rights than new residents was even evidenced in the opinion of the Alaska Supreme Court.

[footnote continued]

The abuses possible by legislatures dominated by long-term residents are readily apparent. The statute before the Court is one of those abuses. It is an attempt to raid the public wealth of a rich State through the device of a durational residency requirement. As the dissent below stated, the statute "has the effect of insulating long-term residents from sharing the State's oil wealth with newcomers during what is likely to be the critical years of the distribution of funds." *Williams v. Zobel,* 619 P.2d 448, 471 (Dimond, J., dissenting). Compensating for past contributions to the State is surely not a compelling State interest. *Cole v. Housing Authority of City of Newport,* 435 F.2d 807, 813 (1st Cir. 1970).

Past intangible contributions are not even rationally related to the benefit provided by the statute. Previous discussions of "past tax contributions" have at least involved tax investment in public facilities. *See Memorial Hospital v. Maricopa County,* 415 U.S. at 286 (Rehnquist, J., dissenting). No citizen of Alaska, past or present, has paid to put the oil and minerals in the ground. On the contrary, those resources belong to all Alaskans in common. In the factual context of this dispute many new residents have made the past contributions or efforts which made the recent development of Alaskan oil possible. This was pointed out in the floor debate on the bill:

> The pipeline is the entity that has allowed us all this latitude to do all the things we're considering doing, not only today but throughout the session. And without that

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The Court went to great lengths to cite Alaskan history since the Gold Rush to show that Alaska suffers from "large numbers of people from without the State [who] move in, derive great financial and other benefits from the State's resources and opportunities, and then move out to enjoy the fruits of their labors elsewhere." *Williams v. Zobel,* 619 P.2d 448, 459-60 (Alaska 1980). The view that new or short-term residents are "exploiters" of Alaska is a grossly over-generalized stereotype and simply inconsistent with Alaska's place in the Union. *See also* the references to "boomers and cheechakos" (Remarks of Rep. Hayes, R. 234), to "Texans and Okies and different people from the Lower 48" (Remarks of Rep. Hurlbert, R. 210). The "gold watch" analogy used by the court below (619 P.2d at 460) ignores the fact that we are discussing a State government and its citizens, not an oil company and its employees. In the United States, there can be no "seniority system" among citizens of a State.

> pipeline, and without newcomers, we couldn't have built that pipeline. Without their skill, without their money, the pipeline wouldn't be there. So I get a little bit tired of — and I've got a hunch an awful lot of people who have been here five or six or seven or ten years, whatever we knock off as newcomers, get a little bit tired of being chastised and penalized and discriminated against for having not been born here or not been here 30 or 40 or 50 years.

(Remarks of Rep. Randolph, R. 208-09).

When the individual contributions of the many new residents who helped build the Alaskan pipeline are compared with those of long-term residents who have spent their lives in prisons or institutions for the criminally insane, the irrationality of judging an individual's contributions to a State on the basis of length of residency becomes apparent. New residents in Alaska work in hospitals saving lives, work the oil fields, run some of the most important economic, financial, and communications institutions in the State and stand guard against foreign invasion.[24] For the majority below to allow the State to judge an individual's contributions to the State by the number of years he has lived there is to indulge an irrational overbroad generalization. *Cf. Cleveland Board of Education V. LaFleur,* 414 U.S. 632, (1974); *In re Griffiths,* 413 U.S. 717, 719, 722 (1973); *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534-38 (1973); *Reed v. Reed,* 404 U.S. 71 (1971); *Carrington v. Rash,* 380 U.S. 89 (1965).

B. ENCOURAGING RESIDENTS TO REMAIN IN THE STATE OF ALASKA IS NOT A COMPELLING STATE INTEREST, NOR IS IT RATIONALLY RELATED TO THE DURATIONAL RESIDENCY CLASSIFICATION

The State has asserted that giving away money based on how long one has resided in the State is part of a State plan to

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[24]The statistics cited by the court below demonstrate that non-residents and new residents have made substantial contributions to the Alaska economy. *Williams v. Zobel,* 619 P.2d 448, 459 n.33 (1980).

achieve a stable population. The permanent fund distribution program is said to be related to attaining a stable population in two ways, not attracting new residents to the State and encouraging present residents to remain in the State. Reducing population turnover is not a permissible governmental objective to the extent it includes discouraging persons from migrating to a State, even if the public benefit programs provided by the State are a factor in the decision to migrate. *Gaddis v. Wyman*, 304 F.Supp. 713, 717 (S.D.N.Y. 1969) (three-judge court) *aff'd mem. sub nom. Wyman v. Bowens*, 397 U.S. 49 (1970); *Shapiro v. Thompson*, 394 U.S. at 631-32.

The State argued below that the purpose of encouraging orderly population growth would not be served if the distribution program benefited all the residents equally because the annual payments would act as a "magnet," drawing large numbers of people into the State who might otherwise have hesitated, or have chosen not to come at all. To the extent that the durational residency classification is aimed at discouraging new residents who would enter the State solely to obtain higher benefits, it is as impermissible as the durational residency classification in *Shapiro*. "[T]he class of barred newcomers is all inclusive lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits." 394 U.S. at 631.

This "magnet" argument has nothing to do with the appellants or the other residents who came to Alaska between 1959 and 1980. The program created in 1980 could not have served as a magnet for them and therefore cannot justify the retrospective grant of cumulative dividends back to 1959 for long-term residents.

Moreover, even if an equal benefit program would encourage some new migrants to come to Alaska,[25] those new

[25]This seems a dubious proposition considering the high cost of living and the high cost of travel to the State. But if true, this "magnet" problem is created by the direct distribution program itself. A state cannot be allowed to enact a program which creates a social problem (attracting new residents to the State) and then solve the problem with an invidious classification.

migrants have a right to consider any State benefit program as much as any other State facility, service or attribute in deciding to move to the State. *Shapiro v. Thompson*, 394 U.S. at 631-32. *Accord, Wyman v. Bowens*, 397 U.S. 49 (1970).

Even if it were permissible, the State's purpose of encouraging a stable population is certainly not compelling. As the Court below noted, population movements are a necessary by-product of the right of interstate migration. 619 P.2d at 460. Solving the "problems" caused by free movement cannot justify an invidious classification based on recent travel. As this Court stated in *Edwards v. California:*

> the State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. . . . But this does not mean that there are no boundaries to the permissible area of State legislative activities. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed on the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

314 U.S. 173-74.

Even assuming an unquestioned power to protect the State's economy from population turnover, the State cannot discriminate against its new residents if reasonable alternatives, adequate to serve legitimate local interests are available. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). The alternative means of creating a stable population could include, but are not limited to, using the earnings from the oil wealth to provide better public services in the State or

using it to create economic opportunities that will reduce or eliminate the boom and bust cycle in Alaska. The Legislature's discretion is broad but not limitless.

The State has never explained why it is compelling, or even permissible, to create greater incentives for longer term residents to remain in the State. There is no reasonable basis for the State to give someone who arrived in 1960 more money than someone who arrived in 1970 if the goal is to discourage both of them from severing their ties with Alaska. As the dissent below pointed out, if the goal is to stop population turnover, giving the most money to the portion of the population that has already demonstrated its attachment to the State makes little sense. 619 P.2d at 469 (Dimond, J., dissenting). When examined closely this asserted purpose dissolves into the assertion that long-term residents are simply more worthy citizens. The statute cannot be saved by such an arbitrary legislative decision.

C. INCREASING PUBLIC INVOLVEMENT IN THE PERMANENT FUND IS NOT A COMPELLING STATE INTEREST NOR IS IT RATIONALLY RELATED TO THE DURATIONAL RESIDENCY CLASSIFICATION

The legislature stated it wanted "to encourage awareness and involvement by the residents of the State in the management and expenditure of the Alaska permanent fund." §1 (b) (3), Chap. 21, Laws of Alaska, 1980. This purpose has been interpreted by the Attorney General and the court below as creating incentives for support for the prudent management of the fund and incentives against "immediate and rapid development of the State's mineral resources." 619 P.2d at 462. The Court below said that if the distributions were made equally to all residents, the residents of the State would know that as the population increases the benefits to the individual resident would decrease and therefore the present population of the State would demand risky investments by the managers of the Fund and rapid development of the State's resources. 619 P.2d at 462. This is just another way of saying that the durational residency based distribution is necessary to encourage

political support for a particular investment or natural resource policy. The Superior Court judge who originally ruled the plan unconstitutional held that this reason was insufficient under any standard of review.

The State of Alaska has never shown why one group of bona fide residents should be given an incentive to be more interested in the fund than other residents. This Court has held on numerous occasions that the need to engender political support for a State program will not justify an otherwise impermissible classification. *Baldwin v. Fish and Game Commission*, 436 U.S. 371, 391-92 n.24 (1978); *Memorial Hospital v. Maricopa County*, 415 U.S. at 266; *Shapiro v. Thompson*, 394 U.S. at 641. Nor will citing concern over the protection of the public fisc justify a durational residency requirement. *Memorial Hospital v. Maricopa County*, 415 U.S. at 263-65; *Rivera v. Dunn*, 329 F.Supp. 554 (D. Conn. 1971), *aff'd*, 404 U.S. 1054 (1972). In *Cole v. Housing Authority of Newport*, the court rejected the argument that incentives for the support of public housing projects would justify a durational residency requirement because it would prevent the political constituency from thinking they had to share their housing projects with future new residents. 435 F.2d 807, 811-12 (1st Cir. 1970).

Contrary to the State's assertion the goal of creating interest in the fund and concern for its wise management would be furthered by giving every resident an equal share in the fund's earnings. The State's concern for preventing incentives for unwise management or rapid development of the State's mineral resources does not explain why the interests of long-time residents should be "counterbalanced" by reducing the benefits given newer residents. This counterbalance theory is a bootstrap argument that cannot support giving long-term residents dividends retrospective to 1959. The argument assumes that the incentives given to long-term residents for larger present earnings must be balanced by creating a constituency against immediate gratification. That does not explain why those chosen to receive the honor are new residents.

To the extent that the existence of the distribution program itself creates political support for large present earnings from

the fund, it is an example of the State creating a social problem which it says it must "solve" by giving less of the public resources to new residents. This is akin to the State saying that providing public schools creates demands for better schools that can only be satisfied if the State gives the better schools to long-time residents. Such an argument, of course, has nothing to do with creating general interest in the school system but has everything to do with making sure the long-time residents get the best schools.

The assertion by the Attorney General that the legislature thought it was enacting a program that had a resource conservation purpose is completely unsupported by the legislative history. This alleged purpose is a total after-the-fact fabrication that is completely unrelated to the statute's true purpose. Even if the program could somehow be transformed into a conservation program by the Attorney General, this Court said in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 285 n.21 (1977) "[a] statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all." In similar fashion a statute which gives long-time residents an interest in risky investments and rapid development while creating disincentives for new residents to support such a program is not a conservation law at all.

IV. SOSNA SETS OUT AN ALTERNATE MODEL UNDER WHICH THIS STATUTE SHOULD ALSO BE DEEMED UNCONSTITUTIONAL

A. THE INDIVIDUAL AND FEDERALISM INTERESTS WHICH THIS STATUTE IMPACTS OUTWEIGH THE INTERESTS WHICH THE STATE MAINTAINS IT FURTHERS

In *Sosna v. Iowa*, 419 U.S. 393 (1975), the opinion of this Court departs from the models discussed previously. In *Sosna*, this Court upheld the constitutional validity of an Iowa statutory requirement that a petitioner in a divorce action be a resident of the State for one year preceding the filing of the petition. Rather than focusing on the nature of the individual

interest asserted and from that determining the appropriate level of scrutiny, the Court appears to have applied a balancing test. The interest of the State of Iowa was held to outweigh the constitutional claims asserted. 419 U.S. at 406-409.

To the extent that the right of interstate migration has been recognized as a liberty interest,[26] a comparison of the relative interests would seem appropriate. This mode of analysis would also seem consistent with the approach of Mr. Justice Stevens in his dissenting opinion in the recent case of *Harris v. McRae*, 100 S.Ct. 2671, 2713 (1980).[27]

Whatever the conceptual origin, *Sosna* can certainly be read for the proposition that balancing the comparative interests is an appropriate method of constitutional decision making in this area.[28] Under this model, the question for this Court would be framed as follows: In light of the comparative interests involved, is the durational residency requirement before this Court reasonable in length?[29]

In the ordinary case, assessing the relative importance of the interests being asserted involves only a comparison of the

[26]*Kent v. Dulles*, 357 U.S. 116, 125-127 (1958)

[27]"This case illustrates the flaw in the method of equal protection analysis by which one chooses among alternative 'levels of scrutiny' and then determines whether the extent to which a particular legislative measure furthers a given governmental objective transcends the predetermined threshold. See *Craig v. Boren*, 429 U.S. 190, 211-212 (Stevens, J., concurring). That method may simply bypass the real issue. The relevant question in this case is whether the Court must attach greater weight to the individual's interest in being included in the class than to the governmental interest in keeping the individual out." 100 S. Ct. at 2713 n.4

[28]In *Duplantier v. United States*, 606 F.2d 654, 672 n.39 (5th Cir. 1979), the Fifth Circuit read *Sosna* for exactly that proposition. Appellants certainly do not mean to suggest that *Sosna* should be read as saying that balancing is the only proper method of constitutional decision making in durational residency cases. Rather, they assume that this Court concluded in *Sosna* that no penalty was present and began its analysis from that point.

[29]Framing the question in this fashion is consistent with the requirement that durational residency requirements must be reasonable in length articulated in the cases cited at pages 12-14.

interests of the individual and the rule making entity. In the context of durational residency requirements, however, one more factor must be added to the balance. Where a State imposes a durational residency requirement, the Federal system also has an interest which is at stake. This federalism concern will vary with the severity of the requirement being imposed. It is certainly more heavily implicated in a situation involving a cumulative open-ended durational residency requirement than it is in a situation in which a State has imposed a simple one year waiting period.

In some situations, welfare or voting for example, the individual and federalism interests so clearly outweigh the State's interest in imposing a durational residency requirement that only the most minimal of requirements can be imposed.

In other situations, the individual and federalism concerns might be of lesser relative importance and thus a longer waiting period might permissibly be imposed. For example, a one year durational residency requirement for obtaining a resident hunting or fishing license might fall into this category. Finally, there are cases in which the State is asserting an interest of great importance such that it outweighs the individual and federalism interests even though they might be fairly weighty themselves. *Sosna* seems to be a case of this variety. This rationale would also explain the upholding of relatively lengthy durational residency requirements in the governmental office category.[30] However, even in those cases the requirement imposed must be reasonable in length.

In some cases then, the balance will be so clearly tipped toward the individual and federalism interests that only the most minimal of requirements will be permissible. In others, the balance might shift in favor of allowing a State to impose a relatively longer waiting period. Whatever the parameters of such an analysis, one thing seems clear. It is difficult, if not impossible, to imagine a set of circumstances where the individual and federalism interests were of such little impor-

[30] *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H.) *aff'd* 414 U.S. 802 (1973).

tance or the State's interest was of such enormous magnitude that a retrospective, cumulative, open-ended and theoretically infinite durational residency requirement could be deemed to be reasonable in length.

In this case, the individual interests are of great importance, the very nature of the classification raises grave federlism concerns and the interests which the State of Alaska asserts are being furthered by this classification are utterly insubstantial. Under any conceivable balancing test, the result below should be reserved.[31]

B. THE CLASSIFICATION OF NEW RESIDENTS IS NOT FAIRLY AND SUBSTANTIALLY RELATED TO THE PURPOSES ARTICULATED BY THE STATE

Sosna has also been read for the proposition that discrimination which is aimed at new residents is to be subjected to some intermediate level of equal protection review.[32] This analysis has lead at least one commentator to observe, "Thus, after *Sosna* one might conclude that the line of cases from *Shapiro* through *Sosna* establishes newcomers as a class that will be viewed by the Court with about the same level of suspicion as that accorded classification on the basis of sex." McCoy, *Recent Equal Protection Decisions — Fundamental Right To Travel or "Newcomers" As A Suspect Class?* 28 Vand. L. Rev. 987, 1016 (1975). There is certainly a sound theoretical basis for such an approach. As discussed previously,[33] new residents, as a class, share many of the attributes of other classifications which have been termed suspect. Particularly in Alaska, one can demonstrate a long history of irrational or unnecessary discrimination against this group.[34]

[31]The majority below did purport to employ a balancing test. 619 P.2d at 453. However, the test which they employed utterly denegrated the federalism interests which are implicated by legislation like this and was unduly sensitive to the "problems" of the State of Alaska.

[32]*See, e.g., Fredrick L. v. Thomas*, 408 F.Supp. 832, 835 (E.D.Pa. 1976); *Lucas v. Secretary, Department of Health, Education & Welfare*, 390 F.Supp. 1310, 1316, n.5 (D.R.I. 1975).

[33]*Supra* at 19.

[34]*See* Footnote 13.

Professor Tribe has attempted to catalog the techniques of intermediate review. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §16-30 (1978). His categorization offers five techniques employed in such review. He terms them assessing importance, demanding close fit, requiring current articulation, limiting after-thought and permitting rebuttal. The import of all these techniques is to ascertain whether legislative classifications actually substantially further important State interests.

The first of these is very similar to the balancing technique which has been previously described. As the relative importance of the interest at stake rises, greater justification is required of the rule making entity.

The second technique which Professor Tribe describes is that of demanding a close fit between means and ends. This technique of review has also been referred to as the fair and substantial relationship test or strict rationality. Under this analysis, the classification must bear more than a hypothetical relationship to the articulated goals.[35] A cumulative open-ended durational residency requirement is not fairly and substantially connected to any of the State's articulated purposes. The fit between means and ends is discussed in Section III, *supra*.

Another technique, which clearly seems appropriate in this case, is limiting the use of after-thought. The State's contention that this classification is a resource conservation measure is clearly the baldest sort of after-thought. Nowhere in the entire legislative history can one word be found which suggests that a single legislator thought that this classification was a resource conservation tool. This argument was concocted in the mind of the Attorney General after this litigation began. It should not be allowed.

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[35] Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv. L.Rev. 1 (1972).

The final technique which Professor Tribe describes is requiring that the legal scheme be altered so as to permit rebuttal in individual cases even where the scheme is not struck down altogether. Here, the Alaska legislature has precluded this option with a specific nonseverability clause. The legislature was clearly not interested in allowing persons to demonstrate that they should be classified on any other basis than the duration of their residency.

Anything more than the most deferential review conceivable will result in a reversal of the lower court. Since this statute clearly intended to single out new residents as a class and since the justifications offered by the State of Alaska for the classification are so tenuous, any meaningful inquiry into the actual basis of the classification, as opposed to some hypothetical exercise, will result in invalidation of the statutory scheme.

CONCLUSION

This Court has never seen a durational residency requirement as extreme in its terms as this one. Its myriad constitutional flaws simply serve to demonstrate the inequities inherent in all durational residency classifications. Where they are to be allowed, their use should be carefully circumscribed.

This program is founded on nothing other than the notion that persons who have lived in Alaska the longest are its most deserving citizens. That view is inconsistent with Alaska's place in the Union.

If this Court does not reverse the Alaska Supreme Court, the distributions made under this program during the next ten years will be counted in billions of dollars. The Court should reverse the judgment of the Alaska Supreme Court and declare the statute before the Court to be unconstitutional.

APPENDIX

APPENDIX A

Article IX, Section 15 of the Alaska Constitution

Section 15. Alaska Permanent Fund. At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

APPENDIX B

LAWS OF ALASKA
1980

Source	Chapter No.
FCCSSB 122	21

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 10

Approved by the Governor: April 15, 1980
Actual Effective Date: April 16, 1980 with Sections 1 and 2 retroactive to January 1, 1979.

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

*Section 1. POLICY, PURPOSES AND FINDINGS. (a) It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state.

(b) The purposes of this Act are

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

(c) The legislature finds that the accrual of permanent fund dividends provided in AS 43.23 enacted in sec. 2 of this Act, based on full years of residency since January 1, 1959, fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood. It is in the public interest to distribute a portion of Alaska's energy wealth to the people of the state.

(d) The legislature also finds that state residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's income from oil, gas, and other mineral production to help offset rising fuel costs.

(e) The legislature also finds that there exists in the state a serious problem of population turnover. A substantial portion of the state's population is comprised of individuals who reside in Alaska for only a relatively short time. This constant turnover in

population leads to political, economic, and social instability and is harmful to the state. It is in the public interest for the state to promote a stable resident population by providing an incentive to encourage Alaskans to maintain their residency in the state.

*Sec. 2. AS 43 is amended by adding a new chapter to read:

CHAPTER 23. PERMANENT FUND DIVIDENDS.

Sec. 43.23.010. ELIGIBILITY FOR PERMANENT FUND DIVIDEND. (a) An individual who is eligible under (b) of this section is entitled to one permanent fund dividend for each full year that the individual is a state resident after January 1, 1959.

(b) For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

(1) is at least 18 years of age; and

(2) is a state resident during all or part of the year for which the permanent fund dividend is paid.

(c) To determine the number of permanent fund dividends to which an individual is entitled under (a) of this section, a year in which the individual is a state resident for less than 12 months may not be counted, but a payment of a permanent fund dividend may be made for that year under (f) of this section. A year for which an individual was entitled to payment of a dividend but failed to file a claim may be counted to determine the number of dividends under (a) of this section.

(d) An individual may receive payment of a permanent fund dividend in a single payment or in 12 equal installments paid monthly by the department.

(e) An individual eligible to receive payment of a permanent fund dividend may elect to defer receipt of that payment. The commissioner shall adopt by regulation a plan which, to the extent permitted under federal law, will allow an individual to defer payment of federal and state income taxes on the payment of permanent fund dividends until the individual actually receives the payment.

(f) If an individual who is eligible under (b) of this section was a state resident for less than 12 months during the year immediately preceding the year in which a claim is filed, the individual is entitled to payment of one prorated dividend. If that individual is also entitled to dividends under (a) of this section based on previous years as a state resident, he is entitled to receive a prorated payment for the total number of permanent fund dividends to which he is entitled under (a) of this section. A prorated dividend or prorated payment under this subsection shall be prorated on the basis of the number of months that the individual was a state resident during the year immediately preceding the year in which the dividend is claimed.

Sec. 43.23.020. PROOF OF ELIGIBILITY. (a) The commissioner shall adopt regulations under the Administrative Procedure Act (AS 44.62) for determining the eligibility of individuals. The commissioner may require an individual to provide proof of eligibility, or he may use other information available to him from other state departments or agencies to determine the eligibility of individuals. The commissioner may establish procedures for paying the permanent fund dividends along with other payments of money or state benefits.

(b) The department may prescribe and furnish an application form for claiming a permanent fund dividend which contains

(1) a statement of eligibility and a certification of residency in substantially the following form:

> I certify that I am a state resident on the date of this application and I have been a state resident for _____ full years and that I understand that my claim for a permanent fund dividend is determined by the length of my residence in the state after January 1, 1959. I also understand that a false claim of residency to obtain a permanent fund dividend is a criminal offense and that if convicted I will forfeit all permanent fund dividends and that I must repay all permanent fund dividends which have been paid to me. I understand that this penalty is in addition to any criminal penalties imposed.
>
> (signature of individual)

and

(2) a statement advising the individual that he may choose to receive the payment of a permanent fund dividend in a single payment or in 12 installments payable monthly and a space where the individual may indicate his choice of payment.

Sec. 43.23.030. AMOUNT OF DIVIDEND. By December 1 of each year the commissioner shall give public notice of the value of each permanent fund dividend to be paid in the following year. The commissioner shall determine the value of a permanent fund dividend by

(1) determining the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 43.23.050(b) in the current year, less the amount, if any, to be repaid in the current year to the general fund under AS 43.23.050(c);

(2) determining the number of permanent fund dividends paid during the current year; and

(3) dividing the amount determined in (1) of this section by the amount determined in (2) of this section.

Sec. 43.23.040. PENALTIES AND ENFORCEMENT. (a) In addition to any criminal penalties imposed by state law, if an individual is convicted of unsworn falsification for a statement made in a certification of residency made for purposes of this chapter, and the conviction is not reversed, that individual is not, and may never become, eligible for a permanent fund dividend, and he forfeits all permanent fund dividends paid to him.

(b) If the commissioner determines that a permanent fund dividend should not have been claimed by or paid to an individual, he may use any collection procedures or remedies available under this title to recover the payment of a permanent fund dividend which was improperly made.

Sec. 43.23.050. DIVIDEND FUND ESTABLISHED. (a) The dividend fund is established as a separate fund in the state treasury. The dividend fund shall be administered by the commissioner and may be invested by the commissioner in the same manner provided for the investment of the Alaska permanent fund under AS

37.13.120. Money in the dividend fund and any interest earned from investment of money in the dividend fund shall be used to pay permanent fund dividends annually and to repay loans from the general fund as provided in (c) of this section.

(b) Each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which was earned during the fiscal year ending on June 30 of the preceding year and which is available for distribution under AS 37.13.140.

(c) The legislature may annually appropriate money from the general fund to the dividend fund if there is not enough money in the dividend fund to pay each eligible individual an annual permanent fund dividend valued at $50. One-fifth of the amount transferred to the dividend fund each year under (b) of this section shall be annually withdrawn from the dividend fund by the commissioner and deposited in the general fund to repay appropriations made under this subsection.

Sec. 43.23.060. DUTIES OF THE DEPARTMENT. The department shall

(1) by the 10th day of each regular legislative session, present a request to the legislature for an appropriation from the general fund to the dividend fund to satisfy the requirements of AS 43.23.050;

(2) annually pay permanent fund dividends from the dividend fund;

(3) adopt regulations under the Administrative Procedure Act (AS 44.62) which establish procedures and time limits for claiming a permanent fund dividend; the department shall set the time limit for applications for permanent fund dividends so that single-payment

permanent fund dividends for a year are paid before October 15 of the following year and so that installment-payment permanent fund dividends for a year begin by October 15 of the following year; and

(4) assist residents of rural areas who because of language, illness, old age, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends.

Sec. 43.23.070. EXEMPTION OF PERMANENT FUND DIVIDENDS. (a) An eligible individual may assign, pledge, or encumber not more than 50 percent of the annual permanent fund dividends which are due and payable or which may become due and payable to the individual.

(b) Fifty percent of the annual permanent fund dividends payable to an individual is exempt from levy, execution, garnishment, attachment, and any other remedy for the collection of a debt.

(c) Fifty percent of the annual permanent fund dividends paid to an individual which are not held separately from other money of the individual is exempt from levy, execution, garnishment, attachment and any other remedy for the collection of a debt.

Sec. 43.23.080. ELIGIBILITY FOR STATE PUBLIC ASSISTANCE PAYMENTS. In determining the eligibility of an individual for old age assistance under AS 47.25.430-47.25.610, aid to the blind under AS 47.25.620 - 47.25.780, or aid to the permanently and totally disabled under AS 47.25.790 - 47.25.970, the Department of Health and Social Services may include as income of the individual only the amount of the

permanent fund dividends in excess of $1,500 paid to the individual for a year.

Sec. 43.23.090. TAX EXEMPTION. Permanent fund dividends provided under this chapter are excempt from taxation under AS 43.20.

Sec. 43.23.100. DEFINITIONS. In this chapter,

(1) "Alaska permanent fund" means the fund established by art. IX, sec. 15, of the state constitution;

(2) "commissioner" means the commissioner of revenue;

(3) "department" means the Department of Revenue;

(4) "dividend fund" means the fund established by AS 43.23.050;

(5) "individual" means a natural person;

(6) "permanent fund dividend" means a right to receive a payment of money from the dividend fund;

(7) "state resident" means an individual who is physically present in the state with the intent to remain permanently in the state or, if he is not physically present in the state, intends to return to the state and he is absent for the following reasons:

(A) vocational, professional or other special education for which a comparable program was not reasonably available in the state,

(B) postsecondary education,

(C) military service,

(D) medical treatment,

(E) service in Congress, or

(F) other reasons which the commissioner may establish by regulation under the Administrative Procedure Act (AS 44.62);

(8) "year" means a calendar year.

*Sec. 3. For 1979 the value of a permanent fund dividend is $50. The payment of permanent fund dividends for 1979 shall be made from an appropriation from the general fund to the dividend fund for that purpose. The amount appropriated from the general fund to pay permanent fund dividends for 1979 less 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending June 30, 1978, is a loan to the dividend fund from the general fund which shall be repaid as provided in AS 43.23.050(c) enacted by sec. 2 of this Act. The Department of Revenue shall by July 1, 1980, prescribe and make available an application form for claiming permanent fund dividends for 1979. The Department of Revenue shall mail the form to each individual who, before July 1, 1980, filed a resident or part-year resident Alaska net income tax return for the 1979 tax year under AS 43.20. An eligible individual may receive payment of permanent fund dividends for 1979 if he applies to the Department of Revenue on the form prescribed by the department no later than September 1, 1980. The application must be accompanied by a statement of eligibility as required by AS 43.23.020 enacted in sec. 2 of this Act.

*Sec. 4. If any provision enacted in sec. 2 of this Act is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that

provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect.

*Sec. 5. Sections 1 and 2 of this Act are retroactive to January 1, 1979.

*Sec. 6. This Act takes effect immediately in accordance with AS 01.10.070(c).